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No. 02-811

Supreme Court, U.S.
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In The

Supreme Court of the United States

JEFF GROH, Special Agent with the Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a search warrant directing the search of a person or place and the seizure of "A single dwelling residence two story in height which is blue in color . . . concealed thereon," satisfies the Fourth Amendment requirement of "particularly describing the place to be searched and the person or things to be seized"?

2. Whether Qualified Immunity protects a federal agent who executes a search warrant so facially deficient that it is nonsensical?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
A. The Respondents and their Ministry	1
B. The Search Warrant	2
C. The District Court Proceedings	3
D. The Decision by the Ninth Circuit Court of Appeals	4
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. PETITIONER VIOLATED THE FOURTH AMENDMENT BY HIS ACTIONS IN OBTAINING AND EXECUTING THE WARRANT	6
A. The Specific Language Of The Fourth Amendment Was Violated Because The Descriptions Of The Places To Be Searched And Things To Be Seized On The Face Of The Warrant Were Nonsensical	6
B. The Application And Affidavit And Any Determination Of Probable Cause Are Irrelevant To A Finding That The Warrant Violated The Particularity Clause Of The Fourth Amendment	8

TABLE OF CONTENTS – Continued

	Page
C. Petitioner Is Responsible For The Violation Of The Particularity Clause Of The Fourth Amendment	12
D. The Ninth Circuit Followed Established Precedent From This Court And The Ninth Circuit And Did Not Create A New Or Novel Proofreading Requirement	18
II. PETITIONER IS NOT ENTITLED TO QUALIFIED IMMUNITY	26
A. Petitioner's Incompetence Is Not Excused By "Greater Incompetence Of The Magistrate"	26
B. Petitioner Violated Clearly Established Law	28
CONCLUSION	32

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Creighton, 483 U.S. 635 (1987)..... 6

California v. Acevedo, 500 U.S. 565 (1991) 29

Center Art Galleries – Hawaii, Inc. v. United States, 875 F.2d 747 (9th Cir. 1989).....19, 20, 21

Guerra v. Sutton, 783 F.2d 1371 (9th Cir. 1986) ...13, 18, 28

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 5, 6

Illinois v. Gates, 462 U.S. 213 (1983) 23, 29

In re Seizure of Property Belonging to Talk of the Town Bookstore, Inc., 644 F.2d 1317 (9th Cir. 1981).....19

Malley v. Briggs, 475 U.S. 335 (1986).....26, 27, 28

Marks v. Clarke, 102 F.3d 1012 (9th Cir. 1996).....*passim*

Maryland v. Garrison, 480 U.S. 79 (1987) 8

Massachusetts v. Sheppard, 468 U.S. 981 (1984).....*passim*

Ramirez v. Butte-Silver Bow County, 298 F.3d 1022 (9th Cir. 2002) 23

U.S. v. Leon, 468 U.S. 897 (1984) .....*passim*

U.S. v. McGrew, 122 F.3d 847 (1997) .....*passim*

U.S. v. Van Damme, 48 F.3d 461 (9th Cir. 1995).....20, 21

United States v. Chadwick, 433 U.S. 1 (1977).....29

United States v. Hillyard, 677 F.2d 1336 (9th Cir. 1982).....18, 19, 21

United States v. Kow, 58 F.3d 423 (9th Cir. 1995).....*passim*

TABLE OF AUTHORITIES – Continued

Page

United States v. Lanier, 520 U.S. 259 (1997).....31

Wilson v. Layne, 526 U.S. 603 (1999).....5, 31

CONSTITUTIONS:

U.S. CONST. Amend. IV .....*passim*

STATUTES:

42 USC § 1983..... 3

Mont. Code Ann. § 27-1-803 (1999) 11

PROVISIONS INVOLVED

Paragraphs of ATF Order 0 3220.1 relative to the circumstances of this case are the following:

7. Obtaining a Search Warrant.

   d. Special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by the magistrate

23. Review of Operational Risk Assessment and Plan, Affidavit, and Warrant

   b. Each person participating in the review of the ATF F 3210.7 shall also examine the warrant and affidavit. If any error or deficiency is discovered and there is a reasonable probability that it will invalidate the warrant, such warrant shall not be executed. The search shall be postponed until a satisfactory warrant has been obtained.

STATEMENT OF THE CASE

A. The Respondents and their Ministry

Respondents Joseph, Julia, Joshua and Regina Ramirez are members of the Tehinnah Apostolic ministry, a non mainstream religion. They resided on the Moose Creek Ranch in Silverbow County, Montana. Pet. App. 30a. The ministry provides refuge to abused women and children Jt. Apx. 18 which results in outrageous reports to law enforcement from estranged husbands. The Moose Creek Ranch includes several hundred acres. Its buildings,

including the blue two story house, are all readily visible to persons driving by on Interstate Highway 15.

B. The Search Warrant

Petitioner, relying on reports from people whose antipathy against the Ramirezes was apparent even in his application, Pet. App. 34a whose information was as stale as six months, Pet. App. 32a further relying on information from informants whose reliability was unsubstantiated, Pet. App. 35a and included a person with a previous felony charge, Excerpts of Record to Ninth Circuit document 5 (hereinafter ER) and Petitioner even admitting in his application that the automatic weapons fire reported in the area could have come from someone firing an automatic weapon lawfully owned by one of Joseph's friends Pet. App. 31a applied for a warrant to search the Ramirez properties.

Petitioner filled in a warrant form, neglected to state any suspected crime, and described the person or place to be searched as the Moose Creek Ranch, Techinna (sic) Apostolic Fellowship and the thing to be seized as, "A single dwelling residence two story in height which is blue in color and has two additions attached to the east." Pet. App. 28a. The magistrate signed the nonsensical warrant and ordered the application and affidavit sealed. ER 7 p. 4 Petitioner executed the warrant in the company of the sheriff and other officers. The affidavit and application did not accompany the warrant. Pet. App. 15a. Telling Mrs. Ramirez they had a search warrant and they were there "because somebody called and said you have an explosive device in a box" Pet. App. 4a, they searched the house, and other buildings for several hours and found nothing. Jt.

Apx. 21. They photographed the home's interior, recorded serial numbers of legal firearms and left. Jt. Apx. 21. When told the next morning by Ramirezs' attorney that the warrant was defective Petitioner faxed a copy of the front page of the application to the attorney. Pet. App. 16a, 21a. Petitioner later supplemented the "sealed record" with an Attachment B that admitted one informant had in fact been previously charged with a felony reduced to a misdemeanor, rather than a misdemeanor only as stated in his affidavit. ER 4.

C. The District Court Proceedings

March 4, 1999 Ramirezes sued agent Groh (Petitioner), the sheriff and his deputy and several other unnamed officers who participated in the raid in a Bivens action and in an action for violation of 42 USC § 1983. Jt. Apx. 17.

The county defendants appeared and answered. Jt. Apx. 4, ER 6. Petitioner appeared by the US attorney. Each party filed the mandatory initial discovery production. Petitioner then filed his Motion to Dismiss or in the Alternative For Summary Judgement accompanied with his own affidavit. No discovery was undertaken, and the only hearing was an argument on the motion. In that argument the US attorney, as Groh's (Petitioner) counsel, admitted the warrant was defective. Pet. App. 22a n.4. The District Court dismissed the claims against the federal defendants on the basis of no Fourth Amendment violation, Pet. App. 20a-22a and qualified immunity. Pet. App. 22a-24a. A later similar motion resulted in dismissal of the claims against the county defendants. Jt. Apx. 7 #42.

D. The Decision by the Ninth Circuit Court of Appeals

Ramirezes appealed to the Ninth Circuit. The Ninth Circuit upheld the dismissal of the case against all defendants except the Petitioner, but ruled that the Petitioner as the leader of the search, and the person who prepared and served the warrant must bear responsibility for the warrant, so facially defective it violated the Fourth Amendment. The court also, based on its clearly established rule of more than a decade, held that because neither the affidavit nor the application were referenced in and attached to the warrant, Petitioner could not rely on them to obtain qualified immunity. Petitioner's Motion for Rehearing and Rehearing *en banc* was denied July 25, 2002. October 31, 2002 petitioner filed his answer in district court. A petition for rehearing was denied with minor amendments to the panel opinion, and the Petition for *Certiorari* was filed.

SUMMARY OF ARGUMENT

A law enforcement officer who, acting on his own, does not seek assistance of the U.S. Attorney, drafts a facially defective warrant, independently seeks and receives a sealed record of his supporting materials, and receives no specific assurances from the magistrate that the facially invalid warrant authorizes the requested search violates the particularity requirement of the Fourth Amendment when he leads an invasion of the intimate sanctity of a private residence based upon that warrant. Petitioner did these things despite the explicit language of the Fourth Amendment that dictates that "no warrants shall issue, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. Amend. IV. Petitioner's actions all took place after this Court explicitly stated that depending on the circumstances of the case, the "Good Faith" exception would not apply if the warrant was "so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *U.S. v. Leon,* 468 U.S. 897, 922 (1984).

Petitioner knew or should have known that the warrant he drafted was constitutionally infirm. He also knew or should have known that if he wanted to keep the application and affidavit in support thereof under seal, the constitutionally mandated particularized description was required to be within the four corners of the warrant. Failing such a description in the warrant, supporting documents that met the particularity requirement, such as an application and affidavit were required to be attached to the warrant. This was the long-standing rule in the Ninth Circuit. *U.S. v. McGrew,* 122 F.3d 847, 849 (1997).

The Ninth Circuit was correct in denying Petitioner's defense of qualified immunity. Qualified immunity is not available in a case like this where the government official violated "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). This Court succinctly defined the issue as "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Wilson*

v. Layne, 526 U.S. 603, 617 (1999) quoting *Anderson v. Creighton,* 483 U.S. 635, 639 (1987) (citing *Harlow, supra,* at 819).

Petitioner at the time he drafted and sought the warrant should have known that the Fourth Amendment requires that a warrant must particularly describe the place to be searched and the things to be seized, and that absent such a description within the four corners of the warrant the Ninth Circuit required him to attach an affidavit and/or application that satisfied the particularity requirement and receive specific assurances from the issuing magistrate that the warrant was valid despite its overbreadth. Petitioner also knew or should have known that the warrant that he drafted was so facially deficient in failing to particularize the place to be searched and the items to be seized that he could not reasonably presume it to be valid.

ARGUMENT

I. PETITIONER VIOLATED THE FOURTH AMENDMENT BY HIS ACTIONS IN OBTAINING AND EXECUTING THE WARRANT

A. The Specific Language Of The Fourth Amendment Was Violated Because The Descriptions Of The Places To Be Searched And Things To Be Seized On The Face Of The Warrant Were Nonsensical

Petitioner used a fill-in-the-blank warrant form. In so doing he checked both the "on the person" and "on the premises" boxes in describing the person or place to be searched. In the position on the form for description of the

person or place to be searched Petitioner typed in, "Moose Creek Ranch, Techinna (sic) Apostolic Fellowship located off of west frontage road, north of the Moose Creek exit off of Interstate 15 approximately one-half to three quarters of a mile." Following the boilerplate language, " . . . there is now concealed a certain person or property, namely (describe the person or property)," Petitioner typed in, "A single dwelling residence two story in height which is blue in color, and has two additions attached to the east. The front entrance to the residence faces in a southerly direction." No reasonable person could conclude that the above description conformed to the Fourth Amendment's mandate that " . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This Court stated in footnote 5 in *Massachusetts v. Sheppard,* 468 U.S. 981, 991 (1984) that "[t]he uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." Citations omitted. This Court applied the rules articulated in *United States v. Leon,* 468 U.S. 897 (1984) to find that the "good faith" exception to the exclusionary rule applied. The question of whether or not there was a Fourth Amendment violation was not decided in *Sheppard*. The clear violation was apparent. There must be a Fourth Amendment violation before the exclusionary rule and the "good faith" exception to it are considered. *Sheppard* provides no authority for Petitioner's contention that there was no Fourth Amendment violation. That case involved a specific application of the "good faith" exception to the exclusionary rule. *Sheppard*'s applicability in supporting

Respondents' position and opposing Petitioner's position in this case is discussed in I C.

Petitioner's reliance on *Maryland v. Garrison,* 480 U.S. 79 (1987) that no violation of the Fourth Amendment occurred is misplaced. This Court determined that the constitutionality of the officers' conduct must be judged in light of the information available to them at the time they acted. *Id.* at 85. However, this Court specifically recognized, "In this case there is no claim that 'the persons or things to be seized' were inadequately described or that there was no probable cause to believe that those things might be found in 'the place to be searched' as it was described in the warrant." *Id.* This Court in *Garrison*, refused to suppress evidence where the officers reasonably believed there was only one apartment on the third floor of the building and stopped their search immediately when they discovered two apartments. In this case, Respondents specifically challenge the description of the place to be searched and the things to be seized. Respondents were prevented from challenging any probable cause determination by Petitioner's actions in having the magistrate seal the record.

B. The Application And Affidavit And Any Determination Of Probable Cause Are Irrelevant To A Finding That The Warrant Violated The Particularity Clause Of The Fourth Amendment

The plain language of the Fourth Amendment provides several means of attacking the validity of a warrant. The Fourth Amendment states, " . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized." Thus there is a group of four distinct requirements for a warrant to be valid. These are not enumerated as alternatives. Failure of any one element will render a warrant invalid. The warrant drafted by Petitioner did not describe with particularity the place to be searched nor the things to be seized. There is no requirement that Respondents challenge probable cause or whether it was supported by oath or affirmation. The requirements are independent. All must be met to obtain a warrant and the lack of any one alone may invalidate it. The Fourth Amendment does not prioritize these requirements making any one less significant than the others.

Because this warrant did not particularly describe the place to be searched or the things to be seized, the agents examined anything and everything on the ranch. This general search is exactly what the Fourth Amendment was designed to prevent.

Petitioner and *Amici* cavalierly state that probable cause existed simply because Respondents assert that probable cause is irrelevant. Respondents have never conceded that probable cause existed and Petitioner's continual reference to the application and affidavit attempts to distract from the issue of failure to meet the particularity requirement, implying that it is somehow less significant than the other requirements of the warrant clause of the Fourth Amendment.

The application and affidavit were first seen by Respondents and their counsel when they were attached as exhibits to the Motion to Dismiss or in the Alternative For Summary Judgment. Petitioner specifically had the magistrate place the record under seal when the warrant

was issued and thereby prevented Respondents and their counsel access to these documents and any others. Neither Respondents nor their counsel have ever seen an order sealing the file. On March 5, 1997, the day after the search, when Petitioner was told by Respondents' counsel that the warrant was facially invalid, Petitioner faxed the cover page of the Application to counsel.

This case illustrates one of the reasons for the Ninth Circuit rule that if the government wants to keep the application and affidavit under seal, the warrant alone must particularly describe the places to be searched and the items to be seized. The person whose home is being searched has no way of knowing the authority of the agents or the limits of the search. The allegedly sealed documents that appeared with the Motion to Dismiss or in the Alternative For Summary Judgment showed no indication of when they were prepared or what was added after the fact. Particularly suspect is an undated "Attachment B" to Petitioner's Affidavit in Support of Application for Search Warrant. In "Attachment B," Petitioner advises the Court that some facts that he told the Court in "Attachment A" were incorrect, i.e., that one of his confidential informants in fact had in 1994, been charged with a felony that was reduced to a misdemeanor. Originally, in "Attachment A" Petitioner had advised the Court that the informant had been charged with several misdemeanors, the last in 1989. "Attachment B" was an "effort to correct the official record" after the fact. Petitioner altered the "sealed" record after the search.

Neither Respondents nor their counsel were aware that a year and a half after the raid, upon motion of Assistant U.S. Attorney Carl Rostad, the seal was removed by order of Magistrate Cebull. However, the Motion

requested and the Order included a Protective Order prohibiting "any **contact with persons identified in the warrant**" without express written permission of the Court. See Order dated October 1, 1998. [Emphasis in original]. Thus, Respondents while unaware of the removal of the seal, were still prohibited from contacting the informants to test whether Petitioner was lying, exaggerating or otherwise fabricating the information in the affidavit. If informants did say what Petitioner claims they told him, Respondents are precluded by the Protective Order from seeking redress for defamation against the informants. Under Montana law false accusation of a crime is slander. Mont. Code Ann. § 27-1-803 (1999).

Petitioner emphasizes that he faxed the first page of the Application for Search Warrant to Respondents' counsel the day after the raid when counsel pointed out the deficiencies of the warrant. This first page of the application contained no indication that there was probable cause. Respondents and their attorney were no better informed with respect to the basis for the warrant than they were the day of the raid. The fallacy of Petitioner's proposition (Pet. Br. P. 14) that officers conducting a raid of a private residence may orally describe the items to be seized or produce or amend a warrant or affidavit the day after the search is obvious. Such a proposition destroys any assurance to the person whose home is searched that the statements are not altered or supplemented. Such a proposition would destroy all assurance that the matter was reviewed by an independent magistrate prior to the search and upon what information the magistrate's conclusions were based.

Neither Respondents nor any court reviewing the warrant have any way of knowing if indeed supporting

documents were prepared prior to the issuance of the warrant. Attachments A and B are not dated. The "photograph attached" has never been produced in the more than six years since the raid took place. As stated above, Respondents have never conceded that probable cause existed for the issuance of the facially invalid warrant. Respondents' position has always been that probable cause is irrelevant when determining whether or not a warrant complies with the Fourth Amendment's particularity requirement. The Ninth Circuit clearly understood this and never addressed the contents of the application and affidavit with respect to probable cause.

C. Petitioner Is Responsible For The Violation Of The Particularity Clause Of The Fourth Amendment

The fact that a warrant is issued by a magistrate does not excuse independent inquiry into its validity by officers involved in the execution of the warrant. In fact ATF Regulation 0 3220.1 #7, and #23 require such inquiry. A warrant, like the one in this case, "may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *United States v. Leon*, 468, U.S. 897, 923 (1984). This Court's statement would have no meaning if the officer had no responsibility as long as a magistrate's signature appeared on the warrant as urged by *Amici* States. *Amici* States' Brief at 17.

The Ninth Circuit followed longstanding precedent in holding Petitioner solely responsible for the violation of the particularity requirement of the Fourth Amendment. The Ninth Circuit's decision in this case is squarely in

agreement with cases it decided prior to the events of this case. Petitioner cites *Guerra v. Sutton*, 783 F.2d 1371 (9th Cir. 1986) for the proposition that it is not necessary for officers executing a warrant to actually see the warrant. Pet. Br. at 34 and *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996) for the proposition that there is no duty to read a warrant after it is issued by the Court. Pet. Br. at 34.

Petitioner ignores the Ninth Circuit's recognition of the division of responsibilities among the various participants in this raid. In *Guerra*, INS agents were told by the city Chief of Police that he was obtaining a warrant. In fact he did not obtain a warrant. The city settled the case with plaintiffs prior to trial. The Court did not, nor did it need to, discuss the liability of the Chief of Police. However, it held that the INS officers could rely on the assurances of the Chief of Police that he had obtained a warrant. However, the Ninth Circuit denied qualified immunity because the INS officers had a duty to inquire as to the nature and scope of the warrant. *Guerra* provides no authority that Petitioner in this case can rely upon. Petitioner was the one who sought the warrant here, more like the Chief of Police in *Guerra* than the INS officers. If anything *Guerra* (a 1986 decision), supports the Ninth Circuit's decision in this case that the unnamed ATF agents and the local sheriff's deputies could rely on Petitioner's assurances that he had a valid warrant.

Similarly, *Marks* supports the Ninth Circuit's decision in this case. In *Marks* the Court found that the officers executing the search had fulfilled their duty to become informed by being briefed as to the scope of the warrant being sought, the nature of the criminal investigation, that investigators had substantial evidence that persons at the residences were trafficking in stolen property, and the

nature of the evidence to be seized. Each officer was informed in some way by authorized personnel regarding the scope of the search. *Marks v. Clarke, supra,* at 1030. Those officers were similarly situated to the unnamed ATF agents and the sheriff's deputies in this case. However, the Ninth Circuit in *Marks,* denied qualified immunity to the officers who, like Petitioner here, applied for the warrant. The Court stated:

> We reject the conclusion of the district court that the officers are insulated by qualified immunity because of their reliance on the approval given by an attorney and the magistrate who signed the warrant. We recently noted in *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), that the fact that a warrant was reviewed by two Assistant United States Attorneys and signed by a magistrate does not amount to "exceptional circumstances" on the basis of which a reasonable officer could rely on a facially invalid warrant. *Id.* at 428. We have held that "absent specific assurances from an impartial judge or magistrate that the defective warrant is valid despite its overbreadth, a reasonable reliance argument fails." *Id.* at 429. The officers applying for the warrant in this case did not ask for, nor did they receive any such specific assurances from the magistrate issuing the warrant. To the contrary, it appears that the magistrate may have been misled by the terms of the request set forth in the affidavit, and may not have noticed the conflict in the papers submitted to him. Accordingly, we hold that the officers who obtained the warrant authorizing searches of "any person on the premises" are not entitled to qualified immunity for that conduct.

Marks v. Clarke, supra, at 1028. Petitioner in this case is on weaker ground than the officers in *Kow* and *Marks*. He did not rely on assurances of any Assistant United States attorneys. Petitioner drafted the warrant himself. Neither Petitioner nor the officers in *Marks* and *Kow* had "specific assurances from the magistrate" that the warrant was valid. Petitioner knew or should have known that the warrant was overbroad and knew or should have known that controlling authority in the Ninth Circuit required him to seek specific assurances from an impartial judge or magistrate that the defective warrant was valid despite its overbreadth. These cases are consistent with this Court's decision in *Massachusetts v. Sheppard,* 468 U.S. 981 (1984).

The facts of *Sheppard* are dramatically different than the facts in this case and others decided by the Ninth Circuit. The issue before the Court was whether the officers reasonably believed that the search they conducted was authorized by a valid warrant. In *Sheppard* the officer prepared the application and affidavit. *Id.* at 984. The application form, when signed by the magistrate would serve as the warrant. *Id.* at 985. He knew he had the wrong form and after the judge reviewed the affidavit and told the officer that he would authorize the search as requested, the officer produced the defective application and warrant form. *Id.* at 986. The officer advised the judge that the form was incorrect and he observed the judge look for a more appropriate form. *Id.* Finding none, the judge told the officer he would make the changes necessary to provide a proper search warrant. *Id.* The judge took the form, made some changes on it, dated and signed it. *Id.* He did not change the substantive portion. *Id.* The judge gave the warrant and affidavit to the applying officer and

specifically told him that the corrected warrant was sufficient authority in form and content to carry out the search as requested. *Id.* These events took place in the home of the judge with the officer present. *Id.* The officer then left with the warrant and affidavit. *Id.* Sheppard correctly applies the rule in *Leon* that the exclusionary rule should not be applied when the officer acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is held to be invalid. The Court in Sheppard concluded the officer had reasonably believed the search was pursuant to a valid warrant. *Sheppard* is consistent with *Leon*'s caveat that, depending on the circumstances of the case, the "good faith" exception would not apply if the warrant was "so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Leon,* 468 U.S. 897, 922. The specific factual circumstances in *Sheppard* described above led to the conclusion that the officers acted in objectively reasonable reliance on a warrant issued by a magistrate that was subsequently held invalid. The ruling is dependent on the unique facts. "We hold **only** that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested." *Id.* at 989, n.6. (Emphasis supplied).

The actions of Petitioner in this case are diametrically opposed to those of the officer in *Sheppard*. The few facts available here about the interaction between Petitioner and the Magistrate are derived from Petitioner's own affidavit in support of the Motion to Dismiss or in the Alternative For Summary Judgement. Petitioner did not have any of his documents reviewed by an attorney. He

recklessly drafted the documents oblivious to his creation of fatal errors including, checking both the box authorizing searches of persons and the box authorizing searches of premises. He described this person and place as the Moose Creek Ranch and typed "A single dwelling residence two story in height which is blue in color and has two additions attached to the east . . . " (ER 1) into the form as the items "concealed" on the ranch. *Id.* He did not point out the errors to the magistrate. He did not watch the magistrate make any corrections. There is no evidence that any corrections were made. The warrant shows no hand written corrections. ER 1. He was not given any specific assurances by word or deed from the magistrate that the warrant authorized the search as requested. There is no evidence that he took the application and affidavit with him to the search. In fact the application and affidavit were placed under seal. "[T]he officer's reliance on the magistrate's probable-cause determination and on **the technical sufficiency of the warrant** he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Leon*, at 922-923 (emphasis added, internal citations omitted). In this case the circumstances surrounding Petitioner's application for the warrant clearly establish that Petitioner had no reasonable grounds for believing his warrant was properly issued and his reliance on the technical sufficiency of the warrant he prepared was not objectively reasonable. Unlike the officer in *Sheppard* who made personal efforts to assure the warrant he was requesting was valid, Petitioner in this case acted plainly incompetently. This Court need look no further than its own decisions in *Leon* and *Sheppard* for controlling eighteen year long standing precedent that Petitioner violated

Respondents' Fourth Amendment rights by drafting, obtaining, and executing a warrant that was "so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *United States v. Leon,* 468, U.S. 897, 923 (1984).

D. The Ninth Circuit Followed Established Precedent From This Court And The Ninth Circuit And Did Not Create A New Or Novel Proofreading Requirement

As discussed in Section C above, the Ninth Circuit's ruling in this case is consistent with this Court's precedent in *Leon* and *Sheppard* and Ninth Circuit precedent in *Guerra*, *Marks*, and *Kow*. Petitioner as the applicant for the warrant and leader of the search knew or should have known that the warrant he was requesting needed to particularly describe the places to be searched and the things to be seized.

In 1982, prior to this Court's holdings in *Leon* and *Sheppard* in 1984, the Ninth Circuit addressed the particularity requirement. In *United States v. Hillyard*, 677 F.2d 1336, 1340 (9th Cir. 1982) the Ninth Circuit recognized that the nature, extent, and circumstances of the criminal activity are, in some respects, relevant in determining the particularity of a warrant. In *Hillyard* the Court was faced with a situation where stolen vehicles were being investigated, and the officers needed to look at serial numbers to see if they were altered and compare them with other records. Of significance to this case, the Court stated:

> The search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit therein. *In re Seizure of Property Belonging to Talk of the Town Bookstore, Inc.*, 644 F.2d 1317, 1319 (9th Cir. 1981); *The United States v. Klein*, 565 F.2d at 186 n.3.

Hillyard, 677 F.2d at 1340. The challenge to the warrant in *Hillyard* was that the warrant was overbroad because it authorized the search of all vehicles on the premises. The affidavit contained a procedure for determining the status of the vehicles, and the warrant clearly stated that the officers were to seize all vehicles which possessed altered or defaced identification numbers. *Id.* at 1339. Even though *Hillyard* was decided before *Leon* and *Sheppard* the result would be the same because the officer had an objectively reasonable reliance on the warrant; because the warrant itself directed the seizure of all vehicles with altered serial numbers; and because the affidavit was referred to and present, and the affidavit set out .. procedure for verifying serial numbers.

After this Court decided *Leon* and *Sheppard* good faith reliance was guided by those principles. The government began to try and get the Ninth Circuit to adopt a "cure by affidavit" rule. In *Center Art Galleries – Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989) the government attempted to narrow this Court's *Leon* and *Sheppard* analysis, by arguing that the overbreadth of a facially defective warrant was cured by a more particular affidavit (the content of the affidavit was only one factor this Court relied upon in *Sheppard*), or alternatively, that the executing officers had acted in good faith reliance on

the defective warrant. The Ninth Circuit rejected the claim because the warrant in that case did not expressly incorporate the affidavit, the affidavit was not physically attached to the warrant, and the executing officers did not give a copy of the affidavit to the property owner as part of the search. *Center Art Galleries*, *supra,* at 750; *Kow*, *supra*, at 429.

The Ninth Circuit in *Kow*, followed *Leon* and determined that because the warrant was facially invalid, no reasonable agent could rely on it absent some exceptional circumstances. The Court affirmed its previous rule that, "when a warrant is facially overbroad, absent *specific assurances* from an impartial magistrate that the defective warrant is valid despite its overbreadth, a reasonable reliance argument fails. *Kow*, *supra*, at 429. The government (pushing for a "cure by affidavit" narrowing of *Sheppard*) argued that the officer believed that his affidavit had been incorporated into the warrant and instructed the executing officers to read the affidavit prior to the search. *Id*. The Ninth Circuit rejected the argument.

Four months prior to the Ninth Circuit's decision in *Kow* another Ninth Circuit panel decided *U.S. v. Van Damme*, 48 F.3d 461 (9th Cir. 1995), a case arising out of Montana. The warrant in *Van Damme* did not say what was to be seized. In the place on the form for listing items to be seized the warrant said "SEE ATTACHMENT #1." Nothing was attached. The Court found that on it's face, the warrant was insufficient. *Id*. at 465. Again the government pointed out that there was an attachment to the application describing the items for which the officers were searching. The Court rejected this attempt to adopt a "cure by affidavit" rule because, "[t]he practical significance of not attaching the list of items to be seized was

that, so far as the record shows, the officers had no document telling them what to take, and Van Damme could look at no document specifying what the officers could take." *Id*. at 466. *Leon*, *Sheppard*, *Hillyard*, *Center Art Galleries*, *Kow*, and *Van Damme* were all decided before the raid in this case.

The government's boldest attempt, prior to this case, in pushing for the "cure by affidavit" narrowing of *Sheppard* came in *U.S. v. McGrew*, 122 F.3d 847 (1997). The warrant in *McGrew* failed to specify any type of criminal activity suspected (neither did this warrant) or any type of evidence sought. *Id*. at 848 (nor did this warrant). The warrant referred to an "attached affidavit which is incorporated herein." *Id*. (The printed warrant form here twice used the word affidavit, but no where did it refer to it as attached). The record did not suggest whether the agents brought a copy of the affidavit, but clearly indicated that at no time was McGrew shown nor given a copy of the affidavit, and the government said the agents would never do so for the safety of its cooperating witnesses. *Id*. at 849 The Court recognized its well settled law of the Ninth Circuit that a "search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit therein." *Id*. (Quoting *Hillyard*, at 1340, internal citations omitted).

McGrew is consistent with *Leon* and *Sheppard*. The Ninth Circuit found that the warrant was defective because it contained absolutely no description of the types of items sought or even the types of crimes for which it sought evidence. The same deficiencies are present here.

The one and only "circumstance" that could apply to a *Leon* and *Sheppard* analysis that the government relied on in *McGrew* was the affidavit that was not attached to the warrant and which the government said it would not disclose to the defendant. Under the circumstances in *McGrew* the Court found, that based on "the clear law of this circuit for more than a decade" *Id.* at 850 n.5 the affidavit could not be relied upon to satisfy the particularity requirement. The Court further stated that the "good faith" exception was not available because there must be an "objective reasonable basis for the mistaken belief that the warrant was valid." *Id.* at 850. (Internal citations omitted). The Court held that there can be no "good faith" reliance on the affidavit's contents if it does not accompany the warrant. There were no other "circumstances" that were offered to the Court comparable to those present in *Sheppard*. No mention was ever made that the officer obtained "specific assurances from an impartial judge or magistrate that the defective warrant was valid despite its overbreadth" as required by the Ninth Circuit since 1995 (*Kow*) and 1996 (*Marks*).

McGrew does not stand for the proposition that an affidavit must be attached to, or accompany a warrant, only that if those criteria are not met the officers are precluded from asserting reliance on the affidavit as evidence of "good faith" or that the warrant met the particularity requirement. The rule in *McGrew* is that if the application and affidavit are not attached they cannot be relied upon as evidence of good faith, nor can they be used to satisfy the particularity requirement. Nothing in *McGrew* prohibits the officer from showing other evidence of "good faith." If the facts were similar to the facts in Sheppard, an officer could show the same diligence

exhibited by the officer in *Sheppard*, i.e., he showed the application to the judge, after the judge told the officer he would issue a warrant authorizing the requested search the officer gave the judge a draft warrant and explained its deficiencies to the judge. The officer watched the judge make corrections and received specific assurances by word and action that the warrant was valid and authorized the search he requested. If the officer then failed to have the attached affidavit he could not rely on its contents to satisfy particularity under the Ninth Circuit's rule, but he certainly could make a case for "good faith," particularly if he had specific assurances by word and action from the issuing judge as required by the Ninth Circuit and as the controlling factor for the decision in *Sheppard*. *McGrew* made no new law nor imposed new requirements on law enforcement officers.

The Ninth Circuit's decision in the present case, *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022 (9th Cir. 2002) is consistent with precedent from this Court and the Ninth Circuit. The Ninth Circuit was correct in concluding that there was a violation of the Fourth Amendment because the warrant failed to particularly describe the place to be searched and the things to be seized, and because the facial deficiency could not be corrected by the unattached affidavit and application. The Ninth Circuit holding is consistent with goals of the Fourth Amendment as explained by this Court in *Illinois v. Gates*, 462 U.S. 213, 236 (1983). The officers gave Mrs. Ramirez no written assurance that the officers had lawful authority to search her home, or the limits of the search. Nor did Mrs. Ramirez have the opportunity to be on the lookout for the officers overstepping their authority. Because the affidavit and application were "sealed" in the court record and not

attached, not incorporated by reference, not present and not shown to Mrs. Ramirez the Ninth Circuit refused to utilize them to uphold the facially invalid warrant. Since these documents were unavailable to Respondents at the search, they provide no meaningful basis to satisfy the particularity requirement so absent from the facially invalid warrant. The Court also refused to permit the unprecedented "cure by oral assurances of the officer" rule urged by Petitioner. Without seeing the sealed documents at the time of the raid Respondents had no written assurances of the officer's authority or limitations of the search.

If the warrant was present, with the affidavit attached and provided to Mrs. Ramirez it possibly could prevent a Fourth Amendment violation pursuant to dictum in *Sheppard*. As discussed above, this Court never decided the question of whether or not the Fourth Amendment was violated in *Sheppard*. There must have been a violation or there would have been no need to discuss the exclusionary rule and exceptions to it. The sole issue before this Court in *Sheppard* was whether the officers reasonably believed that the search they conducted was authorized by a valid warrant. *Id.* at 988 That issue may have been avoided entirely in that case had the issuing magistrate ". . . crossed out the reference to controlled substances, written 'see attached affidavit' on the form, and attached the affidavit to the warrant, the warrant would have been valid." *Id.* at 991, n.7. However, the controlling factor in this Court's decision in *Sheppard* was the reasonable reliance of the officers on the specific assurances of the issuing magistrate. The Ninth Circuit's decision in this case is consistent with Sheppard because the affidavit was not attached or referenced in the warrant and there was no specific assurance from the magistrate.

Thus the warrant is invalid and the particularity requirement of the Fourth Amendment was violated.

The Ninth Circuit did not develop a new requirement to proofread the warrant after it was signed by the magistrate. This Court mandates that "the officer's reliance on the magistrate's probable-cause determination and on **the technical sufficiency of the warrant** he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Leon*, at 922-923 (emphasis added, internal citations omitted). In order for the officer to rely on the technical sufficiency of a warrant it is obvious that at some point he must read it. This is discussed further in Section II A below. A proofreading requirement is, however, found in the ATF regulations in force at the time Petitioner conducted the raid in this case. Paragraphs of ATF Order 0 3220.1 relative to the circumstances of this case are the following:

> 7. Obtaining a Search Warrant.
>
> d. Special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by the magistrate
>
> 23. Review of Operational Risk Assessment and Plan, Affidavit, and Warrant
>
> b. Each person participating in the review of the ATF F 3210.7 shall also examine the warrant and affidavit. If any error or deficiency is discovered and there is a reasonable probability that it will invalidate the warrant, such warrant shall not be executed. The search shall be

> postponed until a satisfactory warrant has been obtained.

Petitioner did not follow his own department requirements. He acted in a plainly incompetent manner.

II. PETITIONER IS NOT ENTITLED TO QUALIFIED IMMUNITY

The affirmative defense of qualified immunity does not provide protection to officers who, like Petitioner, act in plain incompetence, or who knowingly violate the law. "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). No reasonably competent officer, on an objective basis, could conclude that the warrant in this case which stated there was a two story blue house concealed on the person or premises of the ranch was valid.

A. Petitioner's Incompetence Is Not Excused By "Greater Incompetence Of The Magistrate"

In Petitioner's Brief section I B, he attempts to place the ultimate responsibility for the facially invalid warrant that he drafted on the magistrate. A "relative incompetence" defense was specifically rejected by this Court in *Malley v. Briggs*, 475 U.S. 335 (1986). This Court stated:

> . . . and it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant, i.e., his request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate.

Id. at 343 n.9 *Malley's* discussion revolved around a probable cause determination. In this case the incompetence was much clearer. No one could determine from this warrant what things were being sought or the limitations of the search. This warrant never should have been issued. However, Petitioner cannot shirk his sworn duty to uphold, protect, and defend the Constitution by simply placing the blame for his own lack of reasonable professional competence on someone else. His lack of reasonable professional competence is demonstrated by his failure to follow the ATF Order cited in I D above. This Court, seventeen years ago addressed the question of qualified immunity for an officer when the actions of the magistrate were also unprofessional. This Court concluded:

> It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.

Id. at 345-346. As noted above, "the officer's reliance on the magistrate's probable-cause determination and on **the technical sufficiency of the warrant** he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Leon*, at 922-923 (emphasis added, internal citations omitted). It is self-evident to even the most casual observer that Petitioner failed to read the warrant he typed, and likewise the magistrate did not read it within any range of professional competence before he signed it. Petitioner also failed to "be sure that a warrant is sufficient on its face even when issued by the magistrate." ATF Order 0 3220.1 ¶ 7.

B. Petitioner Violated Clearly Established Law

Petitioner correctly asserts that qualified immunity shields officers from damage suits unless their conduct violates "clearly established" constitutional rights which a reasonable person would have known at the time of the events in question. Pet. Br. at 26. (citations omitted). The question is whether the right is clearly established, not whether various courts around the country agree upon an exception to that right or an excuse for law enforcement to ignore it. Petitioner knew or should have known in March of 1997 that any warrant he wished to serve must describe with particularity the places to be searched and the things to be seized. The plain language of the Fourth Amendment has demanded this since its ratification in 1791. See also *Guerra v. Sutton*, 783 F.2d 1371, 1375 n.4 (9th Cir. 1986). "For example, the law was clearly established that warrants must particularly describe the things to be seized,

see, e.g., U.S. Const. Amend. IV." At the time he applied for the warrant, Petitioner also should have known the importance of the particularity requirement that "a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9 (1977) abrogated on other grounds, *California v. Acevedo*, 500 U.S. 565 (1991); *Illinois v. Gates*, 462 U.S. 213, 236 (1983). He should have known that a warrant, like the one in this case, "may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *United States v. Leon,* 468, U.S. 897, 923 (1984). He should have known that in the Ninth Circuit, "absent specific assurances from an impartial judge or magistrate that the defective warrant is valid despite its over-breadth, a reasonable reliance argument fails." *United States v. Kow*, 58 F.3d 423, 429 (9th Cir. 1995); *Marks v. Clarke,* 102 F.3d 1012 (9th Cir. 1996). Petitioner has not claimed that he did not know or could not have known any of these specific principles of Fourth Amendment jurisprudence.

Petitioner's claim of constitutional uncertainty is aimed solely at the Ninth Circuit's refusal to relax the particularity requirement of the warrant clause of the Fourth Amendment by not recognizing the application and affidavit that were not incorporated by reference or attached to the warrant and had been kept under Court seal. The Ninth Circuit did indicate that it would look beyond the four corners of the warrant to the affidavit only if it is referenced in and attached to the warrant. The Ninth Circuit has been willing to do that "for over a decade."

McGrew at 850 n.5. *McGrew* established no new law in the Ninth Circuit. It collects a group of precedent cases establishing a rule which it describes as " . . . a long line of the circuit's clearly established Fourth Amendment precedent" *Id.* at 849; "The well settled law of this circuit . . . " *Id.* at 849; and " . . . the clear law of this circuit for more than a decade, foreclosing any 'reasonable belief' to the contrary." *Id.* at 850 n.5. The fact *McGrew* was decided after the raid here occurred is of no benefit to petitioner's claim of qualified immunity because, as explained in part I D above, *McGrew* encapsulates, analyses, and is based upon over 14 years of precedent in the circuit together with precedent from this Court. Petitioner attempted to distinguish *McGrew* before the Ninth Circuit on the basis of the immaterial fact the government refused to provide the defendant McGrew with the supporting affidavit and application for a period of several months after the search. Pet. Brief to Ninth Circuit 26. *McGrew* reversed the district court because of lack of particularity in the warrant, not on failure to disclose information to the defense. Law enforcement officers in the Ninth Circuit have repeatedly failed or refused to either abide by the plain language of the particularity requirement of the warrant clause of the Fourth Amendment or follow the Ninth Circuit's relaxed standard method for supplementing a facially invalid warrant. The question is not whether the relaxed standard was "clearly established" at the time Petitioner acted. The question is whether the constitutional right that a warrant particularly describe the persons and places to be searched and the things to be seized was "clearly established."

> "[C]learly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.*, at 640 (internal citations omitted); see also *United States v. Lanier,* 520 U.S. 259, 270 (1997).

Wilson v. Layne, 526 U.S. 603, 614-615 (1999).

The particularity requirement is one of the most explicit rights in the constitution. It is much more specific than, and subject to much less interpretation than, "Due Process," "Equal Protection," or even "Probable Cause." Any reasonably trained ATF agent should be able to recognize that this warrant was nonsensical on its face. The record is void of any claim that the warrant made sense on its face. It was objectively unreasonable. The total lack of any action on the part of Petitioner to assure that he had a facially valid warrant indicates that he acted completely incompetently. He could not have objectively reasonably relied upon the warrant. In order to uphold the actions of Petitioner, this Court would have to adopt what Justice Brennan referred to as "the mind-boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant." *U.S. v. Leon*, 468 U.S. 897, 955 (1984) (Brennan Dissent) and hold that qualified immunity protects the plainly incompetent. This Court must recognize that the Fourth Amendment protects innocent persons who have no exclusionary rule remedy.

CONCLUSION

For the aforementioned reasons, this Court should affirm the Ninth Circuit's decision and hold that under the circumstances of this case Petitioner violated the "clearly established" rights of Respondents by executing a facially nonsensical warrant that no law enforcement officer could have objectively relied upon, and that Petitioner is not entitled to qualified immunity as a matter of law. This case should be remanded to the District Court for trial only on the issue of damages.

Respectfully submitted,

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